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In The

Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., DOING BUSINESS AS TRIAD REALTORS,

Petitioners,

v.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, AND BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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I.

BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter C.A.R.)[1] submits this brief in support of the petitioner David Meyer.

II.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

C.A.R. is a non-profit, voluntary, real estate trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 100,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and licensed real estate activity.

Race discrimination and unfair housing practices are societal evils of the first magnitude, and C.A.R actively

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[1] The parties have consented to the filing of this brief. The letter of consent is on file with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

works through its Equal Opportunity-Cultural Diversity Committee to design, promote and implement programs in the areas of minority outreach, fair housing, affirmative marketing, fair lending practices and cultural awareness. But it is important to recognize that the issue in this case is not whether or not and to what extent racial discrimination in housing transactions should be illegal. Rather, the question is simply whether Congress intended to use the Fair Housing Act to punish individual owners, shareholders or broker-officers of a real estate corporation for such discrimination based solely on that individual's status in the corporation.

As the real estate trade association for REALTORS® in California, C.A.R. has extensive knowledge about the licensing and business structures of brokers and salespersons in California. While specific state laws and regulations may vary, the essence of a real estate practice in California is typical of other jurisdictions. C.A.R. believes it can provide the Court with information about these structures that will illustrate how the Ninth Circuit's interpretation of the Fair Housing Act disregards traditional corporate law principles, relating to individual responsibility of officers and shareholder owners, but also is incompatible with licensing structures in California and throughout the country.

Finally, should the Ninth Circuit's interpretation of the Fair Housing Act stand, C.A.R. believes it will be a practical impossibility for real estate broker/officer/owners to meet the new standard. Therefore, to avoid personal liability, the real estate industry will engage in a massive restructuring to shield the broker/officer/owners from personal liability. Such an upheaval is not required by the Fair Housing Laws, nor is it necessary or desired to

enforce the laudable objectives of those laws. C.A.R.'s knowledge of the practical aspects of the real estate business may be of assistance to the Court in understanding the adverse consequences of the Ninth Circuit's erroneous interpretation of the fair housing laws in everyday real estate brokerage.

III.

CASE SUMMARY

Respondents Holleys, who were potential buyers of a home, allege that an individual real estate salesperson (Crank) working for a real estate broker corporation (Triad, Inc.) unlawfully discriminated against the Holleys in their efforts to buy a home by uttering racial epithets and by not presenting an offer to the seller/developer of the home they wanted to buy. The seller/developer, as a result, did not sell the property to the Holleys. Both the Holleys and the seller/developer brought suit alleging unlawful discrimination against Crank and Triad, Inc. Attempting to maximize chances of monetary recovery, the Holleys later expanded their suit to include defendant David Meyer, the sole owner and officer of Triad, Inc., in his individual capacity. The District Court dismissed the claim against Meyer, concluding that Crank's discriminatory acts could be imputed to Triad but not to Meyer as an individual. The Holleys appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit sidestepped well-established corporate law and used an expansionist construction to hold that the federal Fair Housing Act makes Meyer, due to his position as an owner and officer of the corporate brokerage firm, personally liable for fair housing violations

committed by an employee of a corporation he owned. To do this, the Ninth Circuit Court of Appeals relied on an outdated regulation issued by the Department of Housing and Urban Development to broaden the scope of the fair housing law well beyond, if not in contradiction to, established law in other circuits.[2] The holding exposes those who own a corporation to individual liability absent personal involvement. The Ninth Circuit opinion does not include an analysis of the traditional rules governing personal liability of corporate directors, officers or shareholders, and indeed flatly disregards these rules in order to reach its novel, and wholly unjustified, construction of the FHA.

Meyer petitioned this Court for Writ of Certioriari and the Petition was granted by the Court on May 20, 2002.

IV.

THE CORPORATE FORM IS A WELL-ESTABLISHED, COMMON AND BENEFICIAL FORM OF BUSINESS ORGANIZATION IN THE CALIFORNIA REAL ESTATE MARKET WHICH IS REFLECTED IN THE LICENSING STRUCTURE.

Most real estate brokerage activities performed on behalf of others in California require a real estate broker's license from the California Department of Real Estate ("DRE").[3] In California, either an individual or a corporation

[2] For a detailed discussion distinguishing the applicable cases, see Petitioner's brief on the merits and the brief, *amicus curiae* of the National Association of REALTORS®.

[3] California Business and Professions Code, section 10130.

may hold a broker's license.[4] A corporation may hold a real estate brokerage license providing it designates a person who has all the qualifications of a licensed broker as a real estate officer who can act on behalf of the corporation.[5] This person, the corporate broker-officer, must complete the same education requirements as any other broker.[6] The officer of the corporation is licensed only to act as a licensed real estate broker for and on behalf of the corporation as an officer.[7] The corporate entity itself conducts the brokerage activity and holds the separate corporate license. In contrast, only a natural person may hold a salesperson's license.[8] A licensed real estate salesperson may not work independent of a broker,[9] but is licensed to act only through one broker, whether that broker holds a corporate or an individual broker's license.

If a corporation, through its agents and officers violates the real estate licensing law, the California Department of Real Estate may revoke the entity's license. Corporate officer licenses, individual broker licenses and individual salesperson licenses may also be revoked. When it publishes the range of discipline imposed, the DRE even identifies these various types of licenses: real estate corporation (REC), real estate officer (REO), real estate broker (REB) and real estate salesperson (RES). The

[4] California Business and Professions Code, sections 10131, 10211, 10158.

[5] California Business and Professions Code, section 10211.

[6] California Business and Professions Code, section 10171.5.

[7] California Business and Professions Code, section 10159.

[8] California Business and Professions Code, section 10132.

[9] California Business and Professions Code, section 10132.

discipline will attach to the specific type of licensee whether it is an entity, or an individual, depending on the specific actor for the relevant violation.

Structuring a California real estate brokerage business as a corporation is a common phenomenon. In California alone there are more than 15,000 corporate real estate broker licensees and just over 17,000 individuals licensed as corporate broker-officers. Furthermore, 94,000 individuals licensed as real estate salespersons work for a corporate broker.[10] According to the California Department of Real Estate website,[11] as of March 2002 there were 107,664 real estate broker licensees and 208,835 real estate salesperson licensees. Thus, even though corporate licensees represent only 14% of all licensed brokers in California, a full 45% of all real estate salespersons work for these corporate brokers. Accordingly, the decision by the Ninth Circuit has the potential not only to affect the 17,000 corporate broker-officers but also nearly half of all real estate salespeople in California.

Thus, Meyer established a business using the same structure as thousands of other real estate businesses. The corporate real estate structure is not being used by errant real estate officers and owners for the sole purpose of shielding themselves from liability but because it is a valid, well recognized structure that has been developed

[10] Telephone Interview with Thomas Hensley, Licensing Manager, California Department of Real Estate (December 11, 2001).

[11] California Department of Real Estate, Licensing Statistics for 2002, *available at* http://www.dre.ca.gov/stats02.htm.

over decades and has been recognized by the real estate licensing authority.

V.

THE NINTH CIRCUIT ERRONEOUSLY DISREGARDED THE CORPORATE FORM WITHOUT ANY LEGAL JUSTIFICATION.

The Fair Housing Act holds those who discriminate accountable whether they be a sales person, the corporation or other persons who were specifically involved in the act. If the corporate owner or officer is guilty of direct violations, the law reaches that wrongdoer as well.[12] As with any corporation, a real estate firm is ordinarily vicariously liable for the unlawful conduct of real estate salespersons in its employ, including the wrongful discriminatory acts alleged here.[13] Those are not the issues in this case.

A corporation is a well-established business entity that is recognized and sanctioned by the State of California as a valid business structure in the real estate brokerage business; it is also incorporated into the state's licensing scheme. Through the years, the courts and state statutes have established core laws governing when the corporation itself is responsible and when officers and shareholders are responsible. The corporation takes on the

[12] *Hobson v. George Humphreys, Inc.*, 563 F.Supp. 344 (W.D. Tenn. 1982).

[13] *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986). Marsh's California Corporation Law, Section 9.29 at 652 (3d Ed. Supp. 1993).

liability for agents acting within the course and scope of their employment. A shareholder, on the other hand, may not be reached personally unless there is specific action on the part of that individual violating laws or other specific duties, or the corporation has not respected the requisite corporate formation, record keeping, and capital requirements. The officers, likewise, are not held personally liable except in extraordinary circumstances in which the officer directly acted, or was otherwise specifically involved with the deed. These rules could be altered by statute but rarely, if ever, are. And when they are, it must be explicit. However, the Fair Housing Act did not alter these fundamental corporate principles and the Ninth Circuit erred in holding that it did.

In real estate, as in other businesses, the corporate structure advances the interests of owners by reducing the risk associated with business. Rather than risk being unlimited, and thus threatening and intimidating to large and small investors alike, the corporate entity makes the risk limited and thus more inviting.[14] The investor knows that if the corporation incurs liability, the maximum loss exposure is the money placed into the business venture (and lost profits and opportunities associated therewith). The officer understands that if the corporation incurs liability, the officer's job, income, reputation and perhaps immediate livelihood can be lost. The possible personal toll on the officer or investor can indeed be significant. However, both officer and investor expect that their personal assets, such as their own home and savings, will not be

[14] *See* Brodsky, Adamson, Law of Corporate Officers and Directors Section 20.01.

subject to attack and attachment. That expectation is backed by the force of law: well-established rules governing the corporate structure and shareholder and officer liability in corporations.

The corporation does not have a definite life span, like that of an individual, that can be interrupted at any time. It has the advantage of being able to combine assets invested by many rather than the possibly limited assets of an individual or few partners. Corporations can raise additional monetary capital that may not be available to an individual. The benefits of the corporate structure are well known and have been balanced over the years against the issue of personal responsibility for corporate officers and shareholders. These individuals may not be reached unless the corporate structure itself fails, the individuals were personally involved in the illegal acts, or there is a specific statute that imposes personal liability. None of these exceptions applies in this case. The language of the Fair Housing Act does not impose such liability, and the legislative history lends no support to the personal liability issue.[15] Absent specific congressional mandate or authority under FHA, the Ninth Circuit summarily dismissed the bedrock laws of personal liability for corporate officers and shareholders to create a real estate law exception that is plainly erroneous and must be reversed.

The decision below sweeps aside the well-established methods of examining the corporation's validity and holds that, as a matter of law, the person who is the sole owner and corporate broker-officer of a real estate brokerage

[15] *See Amicus* Brief of the National Association of REALTORS®.

corporation is personally responsible for acts of the salespersons simply because it is possible that the broker *could* exercise supervision over the offender. Even though there is no allegation of personal knowledge or involvement, the Ninth Circuit has deemed this tenuous connection sufficient under the federal fair housing laws to reach the owner and officer directly and personally for acts of which he is unaware and did not assist in perpetrating.

In this case, the Ninth Circuit failed to discuss, or even identify, any of the traditional bases to disregard the corporate entity – to pierce the corporate veil, so to speak – and extend liability to Meyer as an individual – who is an owner and officer of Triad, Inc. There is no evidence that the corporate entity was established to perpetuate a fraud, circumvent a statute, evade contractual obligations, or accomplish a wrongful act. There is no evidence that the corporation is inadequately capitalized to engage in the real estate business. There is no evidence, through either words or actions that the separate identities of Triad, Inc., the corporation, and Meyer, the individual, have ceased to exist.[16]

The Ninth Circuit seemed concerned that broker-officers might not take steps to supervise real estate salespersons to ensure that they act in compliance with the FHA. But the FHA simply does not create such supervisory duties; it makes unlawful actual discriminatory

[16] B.E. Witkin, Summary of California Law, Corporations, section 12 (9th Ed. 1989).

conduct. In any event, applicable state law in this case supplies the very protections that the Ninth Circuit improperly imported into the Fair Housing Act. And those protections, in the form of a duty of reasonable supervision, are much more likely to deter discriminatory conduct than the amorphous "right to control" test.

In California, the broker-officer has a duty to exercise *reasonable* supervision over the activities of his or her salespersons.[17]

Reasonable supervision includes, as appropriate, the establishment of *policies, rules, procedures and systems* to review, oversee, inspect and manage:

(a) Transactions requiring a real estate license.

(b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.

(c) Filing, storage and maintenance of such documents.

(d) The handling of trust funds.

(e) Advertising of any service for which a license is required.

(f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

(g) Regular and consistent reports of licensed activities of salespersons. The form and extent

[17] California Business and Professions Code, section 10159.2; California Code of Regulation, title 10, section 2725.

> of such *policies, rules, procedures and systems* are to take into consideration the number of salespersons employed and the number and location of branch offices. The broker shall establish a system for monitoring compliance with *such policies, rules, procedures and systems*. A broker may use the services of brokers and salespersons to assist in supervision so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker (*emphasis added*).[18]

To put these obligations that might satisfy the duty of a broker-officer to reasonably supervise a real estate office in context, one needs to first understand that a real estate brokerage business is a uniquely personal business.

A closer look at the industry will help explain its personal nature. Brokers, through their real estate agents, meet with buyers and sellers, sometimes in person, often times at the real property in question, and sometimes over the phone to establish relationships. Only through these relationships is a real estate transaction begun, often kept together, and sometimes undone. Real estate people do not just work in an office from 9:00am to 5:00pm. Real estate people work in the office, out of their homes, out of their client's homes, from their cars, at escrow and title offices, over breakfast, lunch and dinner, with their office phone, with their home phone, with their cell phone, from a desk, from the hood of their car, during the week, during the weekend, morning, noon and night. Wherever people

[18] *Id.*

(clients, affiliates, etc.) are and at whatever time, a real estate salesperson has to be available. As a result, whether a corporate broker employs one salesperson or one thousand, since it is impossible for an owner or officer to be at all places at all times, one must rely on policies, rules, procedures and systems to prevent wrongful conduct.

Licensed brokers, whether they are corporations, officers or individual brokers are required to exercise this supervision. But the Ninth Circuit would transfigure this requirement into strict liability under the Fair Housing Act for those diligently fulfilling this duty of supervision over salespersons imposed by the state licensing laws.

VI.

SWEEPING ASIDE THE RULES OF PERSONAL LIABILITY FOR OFFICERS AND SHAREHOLDERS UNDER THE FAIR HOUSING ACT WILL CAUSE UNNECCESSARY RESTRUCTURING OF THE REAL ESTATE INDUSTRY WITHOUT ANY CORRESPONDING BENEFIT.

If this Court upholds the Ninth Circuit ruling, corporate broker/owners under the state's licensing structure will have a dilemma: not using the legitimate corporate structure at all and losing all the benefits thereto, or attempting to use the corporate structure and exposing the owner and corporate officer to personal liability for all acts of those persons working for the corporation, whether or not the owner and officer had knowledge of the illegal act, permitted it to occur, properly educated the salesperson or took reasonable steps to reduce the risk that improper conduct would take place.

Thousands of broker-officers currently complying with the state's licensing requirements that a broker oversee corporate real estate activities would be at personal risk under the fair housing laws. Corporate owners and officers would be forced to reconsider their business structure rather than put all personal assets at risk for conduct outside their personal control. The impact of the ruling, in California alone, could reach thousands of real estate broker licensees, tens of thousands of real estate salesperson licensees and hundreds of thousands of individuals that they represent. Those most closely associated with their own business may decide it is no longer prudent to be the sole shareholder or to act as a broker-officer for their own firm; others will be appointed or hired in their place.

In other words, to protect themselves from the potential personal legal liability stemming from the ruling, corporate owners will likely consider an organizational structure that isolates the owner and officer from the business; one that creates distance and barriers rather than involvement. By creating distance between owners or officers and salespeople, reaction time to problems that could be resolved is slowed. By creating distance between a designated broker and policy-setting authority that may reside with the owners or officers of the corporate entity, the designated broker's ability to create options for resolving problems or increasing business may be stymied. This upheaval is not necessary and does not serve any public benefit. But it would be a direct result of affirming the Ninth Circuit's new expansion of the Fair Housing Act.

The Fair Housing Act does not address restructuring the corporate rules. To deny owners and officers of real estate corporations the benefits of limited liability creates a tremendous disincentive to incorporate. It also would

give any broker pause to consider supervising salespersons at all, owning a real estate company or serving as the broker/officer for a real estate company. The societal advantages of a corporate structure to owners, investors, officers and consumers have been established for years. Brokers that also own closely held businesses as corporations, or act as corporate officer, should have the same benefits of these corporate structures that other businesses enjoy outside the real estate industry. Sweeping aside corporate structure rules of liability of shareholders and officers without specific language in the Act authorizing such an expansive reach is without legal justification.

The Ninth Circuit improperly imports (and expands) the state licensing laws into the federal fair housing law. The Ninth Circuit seemed to assume that those licensing laws create the very same liability as the court erroneously derived from an outdated HUD regulation. But under the state licensing laws, the right to direct or control does not automatically equate to liability; before liability may exist there must first be a *breach* of the duty to direct or control. Thus, the court's conclusion is not consistent with the state laws governing personal liability of corporate officers and shareholders upon which it relied. More importantly, these state laws simply cannot *create* liability under the Fair Housing Act.

The Ninth Circuit opinion assumes that a corporate owner, officer or broker-officer has personal liability for acts of salespersons working for the corporation because of general supervisory responsibilities imposed upon the corporate owner, officer or broker-officer. In essence, the position itself exposes the individual owner or officer to liability, not any act of the individual. Under this break from corporate law, the ruling puts the corporate broker/officer

personally at risk for an activity not within his control even if he *had* done everything in his control. Further, the Fair Housing Act does not attach vicarious liability to an individual owner or officer, in addition to the corporation, solely because the broker-officer has the *right* to control conduct. It punishes conduct, not the possibility of conduct. This theory of liability by virtue of position creates liability so burdensome and out of step with other corporate formations that brokers will flee from the structure. If such were the intent of Congress, the words supporting this construction would be found in the language itself. It is not.

VII.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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